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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 291

PAUL GINSBURG,

Petitioner,

vs.

AMERICAN BAR ASSOCIATION, an Unincorporated Association, JOSEPH D. STECHER, et al.,

Respondents.

ANSWER OF AMERICAN BAR ASSOCIATION AND JOSEPH D. STECHER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The questions presented for decision in this case are whether the District Court had jurisdiction of the American Bar Association and whether the complaint filed by plaintiff states a claim on which relief can be granted as to the American Bar Association or Joseph D. Stecher, the Executive Director of the Association.

Plaintiff (petitioner) alleges in his complaint that the District Court has jurisdiction over his claim by reason of diversity of citizenship between plaintiff and the named defendants and the required jurisdictional amount. (Appendix to Brief for Plaintiff, p. 6.) The gist of plaintiff's complaint is that the named defendants combined and conspired with other persons who were members of the Bar of Pennsylvania to destroy the professional reputation of plaintiff and that by reason of this unlawful conspiracy among the defendants and others the plaintiff had been injured in his good name and reputation. (App. pp. 8-9, 25-26.) Defendant American Bar Association, an unincorporated association, moved to dismiss the complaint upon the ground (1) that the District Court has no jurisdiction of plaintiff's claim, (2) that the complaint does not state a claim upon which relief can be granted, and (3) that the claim is barred by the Illinois Statute of Limitations. (App. pp. 13-15.) Defendant Stecher moved to dismiss on the second and third grounds. (App. pp. 30-31.) The complaint was dismissed for failure to state a claim upon which relief can be granted. (App. pp. 27, 32.)

We ignore plaintiff's vituperations and his criticisms of the District Judge, of the Judges of the Court of Appeals and of defendants' attorneys as unworthy of reply.

REASONS FOR DENIAL OF THE PETITION.

The District Court Lacked Personal Jurisdiction Over the American Bar Association.

It appears from the complaint and the motion to dismiss that American Bar Association is an unincorporated association of members of the Bar of Pennsylvania, Illinois and other states. Under Rule 17(b) of the Federal Rules of Civil Procedure, it is clear that the law of the state in

which the District Court is held will determine the capacity of such an unincorporated association to be sued. The law of Illinois, therefore, is controlling upon this question. *Rushy* v. *Electric Utilities Union*, 323 U.S. 72, 74; *Pullman Standard Car Manufacturing Co.* v. *Local Union No. 2928*, (C.A. 7), 152 F. 2d 493, 494. In Illinois an unincorporated association cannot be made a defendant in an action at law. *Johnson* v. *Grand Lodge of Railroad Trainmen*, 16 Ill. App. 2d 186, 188, 147 N.E. 2d 707, 708; *Collins* v. *Barry*, 11 Ill. App. 2d 119, 131, 136 N.E. 2d 597, 602.

The Illinois rule forbidding suits against unincorporated associations in their common name makes plaintiff's service of process upon defendant, American Bar Association, ineffective under Rule 4(d)(3) of the Federal Rules of Civil Procedure, which authorizes service only upon an "unincorporated association which is subject to suit under a common name". Since American Bar Association is not subject to suit under a common name, service on the Association was unauthorized under this rule.

Contrary to plaintiff's contention, the voluntary appearance of American Bar Association did not result in the loss of its right to assert the original lack of personal jurisdiction over it of the District Court. *Blank* v. *Bitker*, (C.A. 7) 135 F. 2d 962; *Orange Theatre Corporation* v. *Rayherst Amusement Corporation*, (C.A. 3), 139 F. 2d 871, 874.

The lack of personal jurisdiction of the District Court over this defendant required that the action be dismissed. *Pullman Standard Car Manufacturing Co.* v. *Local Union No. 2928* (C.A. 7), 152 F. 2d 493, 495.

The District Court Lacked Jurisdiction Over the Subject Matter of Plaintiff's Complaint Against American Bar Association.

Plaintiff alleges that he is a citizen of the State of Pennsylvania and a member of American Bar Association and has been so since 1941. By reason of these allegations, plaintiff has shown that the District Court lacked jurisdiction over the subject matter of his claim in so far as it involves American Bar Association by reason of the absence of diversity of citizenship between the plaintiff and the defendant.

An unincorporated association has not been accorded the status of a legal entity for purposes of diversity jurisdiction, nor has there developed any assumption of a single citizenship of the members. In determining the citizenship of an unincorporated association for purposes of ascertaining diversity jurisdiction, the citizenship of all of the members must be looked to and not merely that of the officers or managers. *Chapman* v. *Barney*, 129 U.S. 677, 681; *Thomas* v. *Board of Trustees*, 195 U.S. 207, 210; *Hettenbaugh* v. *Airline Pilots Ass'n International*, (C.A. 5) 189 Fed. 2d 310, 320.

By pleading that he is both a citizen of the State of Pennsylvania and a member of the American Bar Association, plaintiff has disclosed on the face of his complaint the absence of diversity of citizenship between himself and this defendant, thereby leaving the District Court without jurisdiction over the subject matter of the action in so far as it is alleged to pertain to this defendant.

Dismissal of the action against the American Bar Association was required for this lack of jurisdiction of the subject matter.

The Complaint Fails to State a Claim Against Either American Bar Association or Joseph D. Stecher upon Which Relief Can Be Granted.

Plaintiff alleges that American Bar Association and Joseph D. Stecher, its Executive Director, combined and conspired with others to destroy the professional standing and reputation of plaintiff. There is not a single fact set forth in the complaint to support this charge, nor does plaintiff describe a single overt act on the part of either defendant or even vaguely describe the type of tortious conduct by these defendants to carry out this conspiracy to destroy plaintiff's reputation. In short, plaintiff has alleged no more than a conspiracy to commit an actionable wrong which is not, in itself, a cause of action. *North American Plywood Corporation* v. *Oshkosh Trunk & Luggage Company*, (C.A. 7) 263 Fed. 2d 543, 545; *Bonney* v. *King*, 201 Ill. 47, 50, 66 N.E. 377.

The Illinois courts have uniformly held that the gist of an action involving alleged conspiracy is not the conspiracy but the wrongful acts of the defendants done in pursuance of the conspiracy resulting in damage to the plaintiff. *Pastelniak* v. *Vilimas*, 352 Ill. 270, 277, 185 N.E. 611; *Seno* v. *Franke*, 16 Ill. App. 2d 39, 47, 147 N.E. 2d 469, 473.

Plaintiff's complaint fails to allege any facts whatsoever as to the wrongful acts these defendants allegedly have committed. There is no mention of the terms of the alleged conspiracy, the methods adopted to effectuate the ends of the conspiracy or the overt acts performed by any member of the conspiracy in pursuance of its goals. There is no allegation of fact that any officer, agent or employee of the American Bar Association or that Joseph D. Stecher participated in the commission of any wrongful act affecting plaintiff which resulted in damage to the plaintiff.

Professor Moore has stated well in his treatise, Moore's Federal Practice, §8.13, Vol. 2, p. 1653, that the complaint must allege facts sufficient to support a legal basis for relief. He says:

> "The pleading still must state a 'cause of action' in the sense that it must show 'that the pleader is entitled to relief'; it is not enough to indicate merely that the plaintiff has a grievance, but sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some legal basis for recovery."

It requires no citation to show that plaintiff's complaint violates both the letter and the spirit of Rule 8 of the Rules of Civil Procedure. The complaint fails entirely to inform these defendants and the Court of what the plaintiff is complaining.

The District Court properly entered judgment of dismissal of the complaint for its failure to state a claim on which relief can be granted, and the Court of Appeals properly affirmed the judgment of dismissal.

Plaintiff's Claim Is Barred by the Illinois Statute of Limitations.

To the extent that plaintiff might attempt to prove the injury or destruction of his personal reputation by defendants as a result of oral or written statements of a defamatory character made by them, it is barred by §13 of the Illinois Statute of Limitations, which provides:

> "Actions for slander or libel shall be commenced within one year next after the cause of action accrued." Ill. Stats. (1959) Ch. 83, Par. 14.

According to plaintiff's complaint this cause of action accrued no later than the year 1954, some five years before the complaint was filed, and, therefore, if this is an action for slander or libel, it is clearly barred. The right to raise this defense by motion to dismiss, contrary to plaintiff's contention, has been clearly established. *Anderson* v. *Linton*, (C.A. 7), 178 Fed. 2d 304, 309; *Albrecht* v. *Indiana Harbor Belt Railroad Co.*, (C.A. 7) 178 F. 2d 577, 578.

Conclusion.

For the reasons stated, the District Court properly dismissed the complaint of plaintiff in so far as it pertains to defendants, American Bar Association and Joseph D. Stecher, and the Court of Appeals properly affirmed this decision. The petition for further review by this court should be denied.

Respectfully submitted,

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